Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	
	)	

REPLY COMMENTS
OF ALLIANCE OF RURAL CMRS CARRIERS

The Alliance of Rural CMRS Carriers ("ARC"), by its attorneys, respectfully submits these Reply Comments pursuant to the Commission's Notice of Proposed Rulemaking seeking comment on the Recommended Decision by the Federal-State Joint Board on Universal Service ("Joint Board") regarding the definition of services supported by universal service.

I. Introduction.

As the initial comments make clear, the addition of equal access to the list of supported services under 47 U.S.C. § 214(e)(1) would not improve service to consumers or increase toll competition. If that were so, initial comments supporting the addition of equal access would have been filed by interexchange carriers ("IXCs") and parties commenting on behalf of consumer interests. These parties were altogether silent on the issue – most likely because they recognize that their interests are best served by the competitive marketplace, which has produced a wide variety of wireless rate plans offering long distance at low prices made possible by carrier-to-carrier negotiations.

Predictably, the drive to impose equal access obligations on wireless eligible telecommunications carriers ("ETCs") has been led by rural incumbent local exchange carriers ("ILECs"), who stand to gain the most from such a requirement. Their consistent strategy

throughout has been to erect roadblocks in the way of competitors. In this case, consumers will lose, as the funding of competitive wireless service in rural areas – with the attendant benefits of mobility, location-based E911 capabilities, wider local calling areas, and downward price competition – would be adversely affected by the expenditure of public funds on a "service" that consumers do not demand and is not necessary for health, safety or educational purposes.

Congress surely did not intend that result. The equal access requirement was expressly made inapplicable to CMRS carriers in Section 332(c)(8) of the Act. The one exemption provided under that statute has not been met, and Congress made no similar exemption for universal service "conditions". Additionally, equal access does not meet the statutory requirements for addition to the list of supported services. Because wireless carriers already provide wide calling areas, access to interexchange service, and enhanced emergency calling capabilities, equal access is not essential to education, public health, or public safety. Moreover, equal access is not a "service" that consumers choose, but rather were imposed as a regulatory requirement to increase competition in a toll market skewed by ILEC control of exchange access.

Finally, the selective imposition of equal access obligations on wireless ETCs would also run counter to the pro-competitive mandate of the Act's universal service provisions. Specifically, Congress declared that rural consumers are entitled to a similar array of services at prices comparable to those in urban areas, and enacted a prohibition against universal service requirements that constitute a barrier to competitive entry. Although rural ILEC commenters prefer to ignore these provisions, the Commission cannot.

For all of these reasons, the Commission should reject the arguments urging the addition of an equal access requirement to the list of supported services.

II. Proponents of Adding Equal Access Fail to Explain Away the Clear Statutory Prohibition Against Such a Requirement.

Commenters who argue for the inclusion of equal access as a supported service ("proponents") advocate unlawful agency action that would almost certainly be rejected by the courts. They obfuscate Congress' clear directive in Section 332(c)(8), which states in pertinent part:

> A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. 47 U.S.C. § 332(c)(8).

The statute could not be clearer: CMRS carriers cannot be subjected to equal access requirements. The FCC is permitted to initiate a rulemaking proceeding to determine whether consumers are being denied access to their toll provider of choice, and if so, regulations may be adopted to require all CMRS carriers to provide equal access:

> If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. *Id.*

The FCC may not simply add equal access to the list of supported services without first adopting rules to require it of all CMRS carriers. Had Congress intended equal access to be included within the ambit of ETC status, it never would have adopted the blanket exemption contained in Section 332(c)(8). Instead, it would have enacted a "carve-out" of some sort – as it did with the "denial of access" language – providing that the equal access exemption does not apply to carriers seeking ETC status. The absence of such a carve-out accurately expresses congressional intent.

There is no legal support for the position that equal access may be imposed on CMRS providers as a "condition" of receiving ETC status. By arguing that a CMRS carrier is no longer subject to Section 332(c)(8) once it becomes an ETC, the proponents ignore the statutory language which specifies that equal access shall not be imposed on a CMRS provider "insofar as such person is ... engaged [...] in the provision of commercial mobile services." Unless a wireless carrier ceases to provide CMRS as an ETC, Section 332(c)(8) controls.[1]

In an attempt to deflect attention from the unambiguous language of Section 332(c)(8), proponents claim that a CMRS carrier can choose to have ETC status or it can avoid equal access obligations. Commissioner Abernathy has aptly described this as a "Hobson's choice," that is, not a choice at all.[2] Indeed, by compelling wireless carriers to forgo applying for ETC status, the addition of equal access to the list of supported services would be tantamount to impermissibly requiring equal access under Section 332(c)(8). As such, the addition of equal access "would undercut the procompetitive goals of the 1996 Act."[3]

NTCA's assertion that Congress never intended to use the universal service system to promote competition is without foundation and only undercuts the rural ILECs' supposedly pro-

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[1] OPASTCO cites a Utah Supreme Court case for the proposition that rate regulation can be imposed as a condition of obtaining ETC status. The Utah decision – which stands alone amid dozens of contrary decisions by other state courts and agencies – was soundly rejected by the Commission in its August 2002 *Memorandum Opinion and Order* in WT Docket No. 00-239. In that decision, the Commission stated that equal access obligations cannot be imposed on CMRS carriers as a condition of ETC status. *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service,* FCC 02-164 at ¶ 31 (rel. Aug. 2, 2002).

[2] *Federal-State Joint Board on Universal Service, Recommended Decision,* FCC 02J-1 (Jt. Bd. rel. July 10, 2002), Separate Statement of Commissioner Kathleen Q. Abernathy ("Commissioner Abernathy Statement") at p. 38.

[3] *Id.*

consumer motives.[4] In describing the governing statutory provisions, NTCA ignores or downplays clear congressional declarations in favor of promoting competition in rural areas. For example, NTCA mentions Section 253 without noting that this section, entitled "Removal of Barriers to Entry", requires states to adhere to principles of competitive neutrality and compels preemption of any requirement that "may prohibit or ha[s] the effect of prohibiting the ability of any entity to provide ... service." 47 U.S.C. § 253(a). NTCA even cites, without explanation, the unambiguously pro-competitive mandate found within Section 254(b)(3), which declares that consumers in rural areas should have access to a similar choice among services at prices comparable to those available in urban areas.[5] As Commissioner Abernathy emphasized: "... Congress wanted *both* to exempt CMRS carriers from equal access obligations *and* to promote competition in all telecommunications markets[.]"[6]

III. Equal Access Does Not Meet the Statutory Universal Service Criteria.

No commenter made any credible showing tending to demonstrate that equal access meets the four-pronged analysis contained in 47 U.S.C. § 254(c)(1). In particular, to be a supported service, it must be "essential to education, public health, or public safety". 47 U.S.C. § 254(c)(1)(A). In these three areas, equal access is anything but essential.

In suggesting that equal access is critical in these areas for wireless customers, proponents betray an ILEC-centric worldview that only highlights the need for supported wireless competition. For example, OPASTCO states that equal access is "critical in rural service areas because smaller calling scopes necessitate a higher percentage of toll calls compared to

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4 NTCA Comments at p. 5.

5 *Id.* at p. 6.

6 Commissioner Abernathy Statement at p. 38.

urban areas."[7] The Small Rural ILEC Group ("SRIG") points to the dilemma faced by "residents of high-cost rural areas who often must make long distance toll calls to reach schools, medical and emergency services, and government offices (local, regional, state and federal)."[8]

ARC agrees with OPASTCO and SRIG that small local calling areas are a problem for rural ILEC customers. Indeed, rural ILEC customers are generally limited to a handful of exchanges – sometimes even just their home exchange – beyond which they must incur intra-LATA toll charges, which are normally the most expensive toll calls. The introduction of wireless competition through high-cost support and aggressive infrastructure investment is the way to ensure rural consumers have access to wider local calling areas. Facilitating competition in these areas is especially critical to the public interest because rural consumers without the availability of strong wireless infrastructure are locked into wireline rate structures and calling areas. Additionally, wireless customers are able to place an emergency call from any place where there is a signal, not just the end of a wire. Imposing equal access on wireless carriers will only slow the deployment of these critical facilities, with no health or safety benefits as a result.[9]

Imposing equal access obligations on wireless ETCs would not serve the "public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1)(D). No party has identified any consumer value that would flow from imposition of equal access requirements on CMRS carriers. Adoption of equal access would provide consumers with the option to have a 1+ dialing plan that

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[7] OPASTCO Comments at p. 12.

[8] Small Rural ILEC Group Comments at p. 3.

[9] SRIG's claim (at p. 4) that equal access will ensure network redundancy in the event of a terrorist attack borders on absurd. A customer whose presubscribed IXC service is disrupted by an attack is no better off if there is an equal access requirement. SRIG misses the obvious point: the surest way to guarantee service diversity is by removing barriers to the deployment of facilities-based competition in all areas. If network redundancy is the goal, ARC can think of no better way to deliver it than by providing the appropriate incentives for ETCs to construct facilities in rural areas.

would deliver long distance minutes at a retail price charged by long distance carriers. Today, that price ranges from about 7.5 cents to 15 cents for discounted rate plans. Wireless subscribers today receive long distance minutes for a fraction of that cost. That is why not one ARC member can report even one customer requesting 1+ dialing on a cell phone. Indeed, the value customers receive from bundled wireless plans is evident from the competitive response it has provoked from many local exchange carriers, who have followed suit of late by offering "all in one" packages including nationwide long distance.[10] In sum, ARC is at a loss to understand how the consumer is served by a requirement that will only slow network development that can give consumers what they truly wish for – improved coverage and reliability.

Tellingly, not a single long distance carrier weighed in on this matter in favor of imposing equal access. ARC believes IXCs derive no benefit from 1+ dialing on wireless facilities because they do not want to be in the business of serving wireless customers one-by-one. They would much prefer to deal with carriers for bulk minutes and avoid the cost of obtaining subscribers, the ongoing cost of maintaining databases, and regulatory compliance issues, including having to deal with slamming complaints that are a fact of life in that industry.

IV. Allegations of a CMRS "Windfall" Have No Merit.

GVNW Consulting, Inc. ("GVNW") states that equal access costs are currently contained within ILEC costs – and that it is therefore possible that CMRS carriers are receiving a "windfall" because they receive support based on the ILECs' costs. Even assuming everything GVNW states is true, what it does *not* state is even more important. If a "windfall" were truly at issue, GVNW surely would have stated what percentage of a typical ILEC's high-cost support

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[10] *See* "Callers Jump at Chance to Gab, Gab, Gab," USA Today (April 22, 2003), available at http://www.usatoday.com/money/industries/telecom/2003-04-22-unlimited-phone-plans_x.htm.

constitutes reimbursement for equal access. Indeed, it appears that presubscription costs – which are pennies – make up the bulk of current equal access costs, since hard implementation costs were bought and paid for many years ago. Given that the current "per line" methodology is not a stable source of funds for competitive ETCs, nor is there any certainty that adequate support will be provided, GVNW fails to explain how wireless ETCs receive a "windfall".

ARC believes the Commission should also consider substantial costs that wireless ETCs must bear without any guarantee that such costs will be reimbursed through the high-cost support mechanism. For example, wireless carriers must provide mobile E-911 while wireline carriers need not. The cost to deliver mobile E-911 service in rural areas is very high, and there will be continuing and substantial ongoing compliance costs, as equipment vendors continue to deliver updated solutions that wireless carriers can be expected (and may be required) to introduce. Despite the fact that delivering mobile E-911 is infinitely more complicated and expensive (and valuable to consumers) than fixed 911, the high-cost support mechanism does not provide wireless carriers with any mechanism for recouping these costs. Moreover, mobile E-911 is critical to public health and safety, while equal access does not promise any benefits in those areas.

Thus, it is most unlikely that wireless ETCs will see any "windfall" from not having equal access obligations. To the contrary, when all obligations are washed through the system, it is far more likely that wireless ETCs will receive less than they would if their costs were reimbursed using the ILEC embedded cost methodology.

V. Addition of an Equal Access Requirement Would Not Be Competitively Neutral.

Unlike virtually all rural ILECs, CMRS carriers operate in fiercely competitive markets. Imposition of equal access obligations on some, but not all, CMRS carriers places artificial

incentives and rewards into the market. At a time when small rural wireless carriers strain under the burden of federal and state mandates, imposition of equal access would only serve to create yet another barrier to competitive entry in the local exchange market. The ILECs' position in this matter flows from their apparent desire to drain as many universal service dollars away from network construction, and into regulatory compliance, so as to forestall competition.

While ARC agrees with USTA that it may one day be appropriate for the FCC to consider relieving ILECs of the equal access requirement,[11] USTA is misguided in suggesting that this should happen right away. USTA fails to note that in most rural markets, ILECs continue to operate as monopolies, with a virtual lock on high-cost USF support bolstered by a state-by state competitive ETC designation process that often takes years of costly litigation to complete. Rather than place the deregulatory cart before the competitive horse, the sensible position is to continue to regulate incumbents until their monopoly is broken and then reduce their regulatory burdens.

VI. Conclusion.

When the FCC looks clearly at each party's motives here, this becomes a simple decision. Rural ILECs seek to impose an additional burden on a competitor under the guise of "regulatory parity", while seeking to retain a monopoly on the local exchange market and on available high-cost support. The imposition of equal access on CMRS carriers as a condition for ETC status is expressly prohibited by the Act. An equal access requirement applicable to wireless ETCs would deliver no benefit to consumers and would only serve to slow the deployment of vital and high-quality service in rural areas. This Commission's oft-stated mission is to reduce unnecessary

[11] *See* USTA Comments at p. 6.

regulatory burdens on competitive carriers.[12] ARC urges the Commission to decline to adopt yet another regulatory burden, championed by an industry seeking to forestall competition, that delivers no public benefit and only serves to retard network development and consumer choice.

Respectfully submitted,

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[12] *See Federal-State Joint Board on Universal Service, Report and Order,* 12 FCC Rcd 8776, 8832-33 (1997). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order,* 9 FCC Rcd 1411, 1421 (1994) ("*CMRS Second Report and Order*"); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order,* 85 FCC 2d 1, 31 (1980).

CERTIFICATE OF SERVICE

I, Janelle T. Wood, an employee in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 28th day of April, 2003, sent by hand-delivery, a copy of the foregoing *REPLY COMMENTS OF ALLIANCE OF RURAL CMRS CARRIERS* to the following:

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